



Paul E. Helliker
Director

Department of Pesticide Regulation



Gray Davis
Governor
Winston H. Hickox
Secretary, California
Environmental
Protection Agency

Pesticide Drift Incident Response Policy

**Date
established**

September 25, 2000

**Enforcement
Letter**

ENF 2000-034

Approval

original signed by

David Duncan, Acting Chief
Pesticide Enforcement Branch
(916) 445-3871

Referrals

If you have any questions pertaining to this document, please contact your Senior Pesticide Use Specialist liaison.

DPR policy

When the county agricultural commissioner (CAC) becomes aware of an incident involving pesticide drift, the incident must be promptly investigated, including complaints that are anonymous and/or not in writing. Some episodes may meet the criteria for initiating a priority investigation.

Each investigation must be completed, even if the complaint is withdrawn or the complainant receives compensation for any alleged damages.

When conducting an investigation involving pesticide drift, the CAC should determine whether the applicator violated Food and Agricultural Code (FAC) section 12972, Title 3, California Code of Regulations (3 CCR) section 6614, or other regulations.

Continued on next page



Pesticide Drift Incident Response Policy, Continued

Prior policy documents

This policy supercedes the Department of Pesticide Regulation's (DPR's) Pesticide Enforcement Bulletin, *Pesticide Drift Enforcement Policy* (ENF 97-036) and all previous policies, including those stated in the Manual of Procedural Guidance for Pesticide Enforcement Personnel, with which it may conflict.

Authority

FAC section 2281. Under the Governor's Reorganization Plan Number 1 of 1991, FAC section 2281 provides, in part:

"Except as otherwise specifically provided, in all cases where provisions of this code place joint responsibility for the enforcement of laws and regulations on ... the Director of Pesticide Regulation and the commissioner, the commissioner shall be responsible for local administration of the enforcement program. The ... Director of Pesticide Regulation shall be responsible for overall statewide enforcement and shall issue instructions and make recommendations to the commissioner. The instructions and recommendations shall govern the procedure to be followed by the commissioner in the discharge of his or her duties...."

FAC section 12977. FAC section 12977 places joint responsibility on the DPR director and CACs for enforcement of the article and regulations adopted pursuant to it, with the CACs operating under the direction and supervision of the director. Section 12977 provides:

"The director, and the commissioner of each county under the direction and supervision of the director, shall enforce the provisions of this article and the regulations adopted pursuant to it."

Continued on next page

Pesticide Drift Incident Response Policy, Continued

Definitions

- **Drift** – the pesticide that moves through the air and is not deposited on the target area at the time of application.
 - Drift does NOT include the movement of pesticide and associated degradation compounds off the target area after the application, such as by translocation, volatilization, evaporation, or the movement of pesticide dusts or pesticide residues on soil particles that are windblown after application.
 - **Sensitive site** – is a location determined by the CAC or DPR director, based upon his or her evaluation, to contain things that could suffer harm or injury from the pesticide in question, such as sites containing people, crops where minor amounts of residue can cause harm, honey bees, wildlife sanctuaries, etc.
 - **Target area** – that particular area (or target) on which the applicator intends the pesticide to be deposited.
 - **Translocation** – movement through ground water or surface water.
-

Background

When people apply pesticides, they have a particular target on which they want to deposit the pesticide. The target often is referred to as a target area. The target area can be a field, orchard, structure, kitchen counter top, water body, pet, flower bed, lawn, etc.

Some pesticide drift is expected from aerial and other above-ground pesticide applications. Recognizing this, California's Legislature required only that pesticides be used in a manner that prevents substantial drift to nontarget areas (FAC section 12972).

Continued on next page

Pesticide Drift Incident Response Policy, Continued

Minimizing drift

To minimize drift, pesticide labels may direct applicators not to apply the product when environmental conditions favor drift or may include specific use directions designed to minimize drift. In addition, DPR has adopted various regulations to minimize drift. These include the following 3 CCR sections:

- 3 CCR section 6460 – Drift Control (liquid dicamba, propanil, and other pesticides)
- 3 CCR section 6462 – Propanil
- 3 CCR section 6464 – Phenoxy and Certain Other Herbicides
- 3 CCR section 6466 – Paraquat
- 3 CCR section 6470 – Cotton Harvest Aids (DEF, Folex, and Paraquat)

The CAC may include conditions, in addition to those on the labeling or in regulations, to minimize drift when issuing permits for use of restricted pesticides.

Legal requirements

Legal requirements concerning drift are typically intended to protect certain sites or areas, which often are referred to as *sensitive sites*.

FAC section 12972 requires persons to use pesticides in a manner to prevent substantial drift to nontarget areas.

In addition to legal requirements intended to minimize drift, 3 CCR section 6614 prohibits making or continuing a pesticide application when specified situations exist.

In the attached appendix

The attached appendix contains the following topics.

Topic	See Page
Establishing Due Care – FAC section 12972	Appendix - 5
Establishing a Reasonable Possibility of Harm or Damage – 3 CCR section 6614	Appendix - 8

Pesticide Drift Incident Response Policy

Establishing Due Care – FAC Section 12972

Introduction This document will describe how to establish due care.

Background FAC section 12972 requires persons to use pesticides in a manner to prevent *substantial drift* to nontarget areas.

Even though the 3 CCR section 6000 definition of substantial drift includes the phrase “quantity of pesticide,” a determination that drift was substantial is NOT dependent on the amount of pesticide that was deposited outside the target area, but, rather, by a determination that the applicator did not use due care. Pesticide drift is substantial if the applicator did not use due care.

- Definitions**
- **Due care** – the degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under the same or similar circumstances. When a person does not exercise due care, the person is said to be negligent.
 - **Substantial drift** – the quantity of pesticide outside the treated target area is greater than that which would have resulted had the applicator used *due care* (3 CCR section 6000).
-

Establishing due care To prove that an applicator failed to use due care in making a pesticide application, the CAC must present sufficient evidence, in effect, that the applicator failed to do what a reasonable applicator would or would not have done under the same or similar circumstances. This can be difficult.

To determine whether an applicator used the care that was due, it is essential to determine what the weather and other conditions were at the time of the application, what the conditions were at and near the target area, and what decisions were made and what actions were taken by the applicator. The applicator’s actions, or lack of actions, will be the deciding factors in determining whether the applicator used due care under the circumstances that existed at the time of application, and, thus, whether the pesticide was or was not used in a manner to prevent substantial drift to nontarget areas.

Continued on next page

Establishing Due Care – FAC Section 12972, Continued

Establishing due care, continued

This determination may involve referencing published good established practices or having other applicators specify the actions they would or would not have taken under the conditions that existed at the time of application, and comparing them to the actions the applicator took.

Example: applicator's judgment

An applicator's poor judgment could include a decision to apply a pesticide under marginal weather conditions when there are nearby crops that are sensitive to damage by the applied pesticide, or a decision to use equipment or make a type of application (e.g., an aerial application) that was not appropriate for the particular situation.

Example: supporting evidence

To prove a violation of FAC section 12972, the CAC must collect and present at the hearing evidence to show each of the following:

1. The person/company charged with the violation applied a pesticide to a particular target area.

Supporting evidence (examples) may include:

- Records of application
- Statements made by the applicator
- Testimony of persons who witnessed the application
- Positive sample analyses.

2. The application resulted in pesticide being deposited outside the target area.

Supporting evidence (examples) may include:

- Positive sample analyses of crop foliage, clothing, or other things located outside the target area
 - Testimony of persons who observed the application.
-

Continued on next page

Establishing Due Care – FAC Section 12972, Continued

Example: supporting evidence, *continued*

3. The applicator failed to use the care that was due under the circumstances that existed at the time of the application.

Supporting evidence (examples) may include:

- Evidence of the circumstances/conditions that existed at the time of the application;
- Evidence of actions taken by the applicator to show what care the applicator used under those conditions;
- Standards of care published by the pest control industry for such circumstances (if any);
- Testimony at the hearing from one or more pest control applicators (other than the applicator in question) or other persons to compare the judgment and actions of the applicator to those of a reasonable applicator under the same or similar circumstances.

OPTIONS: The CAC could establish that the applicator failed to use due care by showing at the hearing, the applicator failed to follow:

- Drift control standards (if any) required by the pesticide label;
- Certain general standards of care specified in 3 CCR section 6600;
- Drift minimization requirements specified in permit conditions; or
- Regulations intended to minimize drift.

However, in these instances, the CAC could charge a violation of one or more of these applicable laws or regulations rather than a violation of FAC section 12972.

DPR recommends that the CACs reserve administrative civil penalty actions for alleged violations of FAC section 12972 for those cases where the CAC's evidence clearly establishes that an applicator failed to use due care at the time of the application. These cases most likely will "stand out" because the applicator would have used poor judgment.

References

- Investigative Sampling Manual
 - Investigative Techniques Manual
 - Pesticide Episode Investigation Procedures Manual
-

Pesticide Drift Incident Response Policy

Establishing a Reasonable Possibility of Harm or Damage-

3 CCR section 6614

Introduction	This document describes how to establish a reasonable possibility of harm or damage.
---------------------	--

Background	<p>3 CCR section 6614 places responsibility on the applicator <i>prior</i> to making a pesticide application to evaluate the surrounding properties and other conditions (e.g., application equipment, meteorological conditions, the property to be treated, etc.) and determine the likelihood of harm or damage in order to decide whether the application should be made.</p> <p>3 CCR section 6614 also requires the applicator, <i>during</i> the application to continually monitor these conditions to determine if the likelihood of harm or damage has arisen during the application in order to further decide if the application must be discontinued.</p> <p>3 CCR section 6614 prohibits making or continuing a pesticide application when:</p> <ol style="list-style-type: none">1. There is a reasonable possibility of contamination of bodies or clothing of persons who are not involved in the application process;2. There is a reasonable possibility of damage to nontarget crops, animals, or other public or private property; or3. There is a reasonable possibility of contamination of nontarget public or private property, including the creation of a health hazard, preventing the normal use of the property. In determining a health hazard, the amount and toxicity of the pesticide, the type and uses of the property, and related factors must be considered.
-------------------	---

Continued on next page

Establishing a Reasonable Possibility of Harm or Damage-

3 CCR section 6614, Continued

Applicator's obligations

To fulfill the applicator's obligations under 3 CCR section 6614, the applicator must evaluate surrounding nontarget properties, be aware of the types and uses of the surrounding nontarget properties, and to be aware of nearby crops or animals. The applicator must also have knowledge of the effects of the pesticide in order to decide whether contamination of nontarget property with the pesticide that will be applied could create a health hazard that would prevent a normal use of the property. Also, the applicator must constantly look for the presence of persons not involved in the application process. The applicator must not make or must discontinue an application when the reasonable possibilities specified in the **Background** section exists.

Examples: applicator's responsibilities

Basically, 3 CCR section 6614 states that even though the applicator will use the same care that reasonable applicators would use under the same or similar circumstances to minimize drift to nontarget areas, there still are certain situations where the application cannot be made, or, once started, cannot be continued. These situations involve possibilities that are *reasonable* ones under the circumstances of the particular application, i.e., possibilities of which the applicator *reasonably* should have known.

For example, the applicator should evaluate whether a sensitive site is near the target area. If the target area is near residential property, a road on which vehicles and people travel, or another sensitive site, the applicator should consider:

- Distances from the target area to the sensitive site;
- The layout of the target area (e.g., the presence of power poles or trees on the target area, the shape of the target area, the application pattern that will be used, etc.);
- The use of buffer zones;
- Making the application when the wind is blowing away from the sensitive site, or
- Using a different application method than that originally planned or hoped to be used.

Continued on next page

Establishing a Reasonable Possibility of Harm or Damage-

3CCR section 6614, Continued

County agricultural commissioner's role and responsibilities

If a person's pesticide application contaminates the bodies or clothing of persons not involved in the application process, does damage to nontarget crops or other property, or contaminates property creating a health hazard that prevents a normal use of the property, then, generally, in most cases, the CAC will be able to show that the person applied the pesticide when there was a *reasonable* possibility that the consequence would happen and the person violated 3 CCR section 6614.

However, occasionally there could be a case where an application caused the damage (or other consequence) described in 3 CCR section 6614, but the evidence shows that the possibility that the damage (or other consequence) would result was **not** a reasonable possibility.

Where a consequence mentioned in 3 CCR section 6614 (e.g., property damage) occurs as a result of an application, before initiating an administrative civil penalty action alleging a violation of 3 CCR section 6614, the CAC should carefully consider all the circumstances surrounding the application, including pesticide label directions aimed at preventing the consequence, to decide if the possibility the consequence would occur was a reasonable one. Even if the CAC believes there was a reasonable possibility the consequence would occur and proposes a civil penalty action, the respondent, at the hearing, still has an opportunity to show that the possibility was not reasonable under the particular circumstances of the application.

References

- Investigative Sampling Manual
- Investigative Techniques Manual

cc: Mr. Daniel J. Merkley, Agricultural Commissioner Liaison

RH